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Employment Practices Newsletter - July 2012

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Pharmaceutical Sales Representatives Appropriately Classified As "Outside Salesmen"

Former pharmaceutical sales representatives visited doctors' offices and promoted their employer's pharmaceuticals, seeking nonbinding commitments from doctors to prescribe these products to their patients. The representatives sometimes worked more than 40 hours per week, although they were not required to report their work hours. The representatives were not paid overtime because the employer classified them as exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) on the grounds that they were "outside salesmen." The representative filed a class action lawsuit against the employer for overtime pay, arguing that the exemption did not apply to their position because they did not actually engage in sales. At the district court level, the employer prevailed. The representatives challenged the court's ruling, arguing that the court failed to consider the U.S. Department of Labor's (DOL) interpretations of the applicable regulations. The DOL urged the court to interpret the term "sale" for the purposes of the outside sales exemption requiring a consummated transaction directly involving the employee for whom the exemption is sought. The DOL also argued that "[a]n employee does not make a 'sale' . . . unless he actually transfers title to the property at issue." The district court and the U.S. Court of Appeals for the Ninth Circuit rejected this argument, and the case proceeded to the U.S. Supreme Court. The high court similarly found the DOL to be unpersuasive and refused to defer to them. The Court ultimately held that the employer had properly classified its pharmaceutical sales representatives as "outside salespersons" and that these employees were accordingly exempt under the wage and hour requirements set forth in the FLSA. The Court reasoned that the tasks undertaken by the representatives and the type of regulatory environment in which they worked, as well as their high salaries and nonstandardized work compelled this conclusion. Further, the Court opined that to adopt the DOL's proposed interpretation would result in "unfair surprise" to an industry which had classified employees in this manner for decades and had never been subject to a DOL enforcement action on these grounds. Properly classifying employees can be a daunting task, and given the risk associated with misclassification, employers should carefully consider employees' actual job duties in relation to federal and state exemptions, and work with counsel in order to determine the proper classification.

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Christopher et al. v. SmithKline Beecham Corp., No. 11-204 (U.S. June 18, 2012)

Health Care Reform Law Means Big Changes for Employers

On June 28, 2012, the U.S. Supreme Court upheld the Patient Protection and Affordable Care Act, which requires that most Americans maintain minimum essential health coverage. While the legislation contains numerous provisions, several apply specifically to employers and require that affirmative steps be taken starting in 2014 to ensure compliance. First, large employers (*e.g.*, those with more than 200 full-time employees) will be required to automatically enroll new full-time employees in health plans and to continue enrollment for current employees. Employees will be provided with notice and the opportunity to opt out, however. Second, the legislation contains a provision known as "employer shared responsibility," which means that every employer with more than 50 full-time equivalent employees must offer affordable health insurance to its employees, and will be required to report to the U.S. Department of Health and Human Services that it has, in fact, provided "minimum essential coverage." A third provision prohibits any group health plan or insurance issuer from instituting a waiting period on the commencement of health benefits which exceeds 90 days. Employers that fail to provide coverage or who otherwise fail to comply with the mandates of the act are subject to various types of penalties. Although the majority of the provisions do not take effect until 2014, employers should start working with counsel to draft and implement policies and practices to ensure compliance with the law.

National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, No. 11-393 (June 28, 2012)

Supreme Court Prevents Union From Automatically Deducting Special Assessment Fees From Nonunion Members

A California public sector union joined a coalition of other public sector unions in opposing ballot proposals aimed to curtail the state budget deficit. One of the proposals allowed then Governor Arnold Schwarzenegger to reduce public employee compensation under certain circumstances. In response, the public-sector union imposed an emergency assessment on all public employees within its bargaining unit, which meant deducting sums from both union and nonunion employees' wages. Although California does not require its public employees to become union members, it does require all employees within the bargaining unit to pay a certain percentage of their salary to the union because the union negotiates their salaries and benefits. Nonunion members may opt-out of the union's political initiatives, but they are always required to pay the "chargeable amount" reflecting the cost of the union's negotiation on their behalf as public employees. After the special assessment was announced, 28,000 nonunion public employees joined a class action lawsuit arguing that the special assessment violated their First Amendment rights because it required nonmembers to subsidize the union's political speech. The union responded that it had honored the previous opt-outs by assessing them a lower percentage of the special assessment. The U.S. Supreme Court rejected the union's argument and found that if a union seeks to impose a special assessment, it is required to provide notice and is prohibited from assessing the fee on any of its nonmembers unless the nonmember specifically "opts in" and affirmatively agrees to pay the special assessment. Federal and state laws impose various restrictions on deducting sums from employees' wages. Although the fees at issue in this case were imposed by the union, employers should nevertheless take care to ensure that the appropriate notice and authorization have been provided to employees when making deductions.

Knox v. Service Employees International Union, Local 100, No. 10-1121 (June 21, 2012)

Sixth Circuit Rejects Claim of Age Discrimination Based Upon Salary Experience Rating

An employer decided to implement a compensation system that awarded larger raises to newer employees than to more experienced employees. One employee alleged that the system was discriminatory based on age. In response to the employee's allegation, the employer explained: "intuitively . . . we all know that the value of experience goes down with age." The employee sued, alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The U.S. Court of Appeals for the Sixth Circuit rejected the employee's claim. The court found that the employer's statement was not "direct evidence" of age discrimination because the employer "merely expressed the view that experience is subject to diminishing returns" and, therefore, the remark was "ambiguous at worst, and certainly [did] not require the conclusion that unlawful discrimination motivated [the employer's] decision." Additionally, the court found that the employer's compensation system "was based on reasonable factors other than age." An employer does not violate the

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ADEA “where the factor motivating the employer is some feature other than the employee’s age, even where the motivating factor is correlated with age.” Accordingly, the employee’s age discrimination claim was precluded. Employers must not make employment decisions that are based on an employee’s age and must be mindful of factors which may correlate with age.

*Blandford v. Exxon Mobil Corp.,*Case No. 10-5795 (6th Cir. June 5, 2012)

NLRB: Retailer Violated NLRA By Forcing Nonunion Workers to Distribute Flyers Regarding Union Organizing Efforts

As part of a union organizing campaign at a grocery store, union representatives and off-duty grocery store employees distributed pro-union flyers in the parking lot of the store. After a number of customers complained to management, the employer had its employees greet customers at the door with its own flyer apologizing for the inconvenience and advising that it provided fair pay and benefits to its employees. The flyer further stated, falsely, that the pro-union literature was not being distributed by the store’s employees. Two employees then filed an unfair labor charge, alleging that the employer had violated the National Labor Relations Act by requiring employees to make an observable choice against the union organizing campaign. Although the administrative law judge found no unfair labor practice (because the flyer did not express a position on unionization), the National Labor Relations Board (NLRB) disagreed. The NLRB found that “material need not contain an explicitly antiunion message in order to be part of an employer’s campaign.” Rather, “the key inquiry is whether employees would understand the material to be a component of the employer’s campaign.” The employer’s flyer had been a direct response to the union’s protected handbilling and had been a clear effort “to generate community opposition to the organizing effort.” Under those facts, the NLRB found, the “employees were not permitted to choose whether to express an opinion or remain silent; instead, they were compelled to participate publicly in making the [employer’s] statement.” Employers must remember that a response to pro-union activity during a union organization campaign—even a response that is necessitated by customer complaints—could lead to unfair labor charges being filed if not carefully handled.

Tesco PLC d/b/a Fresh & Easy Neighborhood Market, Inc., 358 NLRB 65 (June 25, 2012)

Complaint of Harassment Does Not Insulate Employee From Discipline for Insubordination

A driver for a medical supply company saw what he perceived to be a noose hanging from a co-worker’s bulletin board. The driver was offended and provided a written complaint to a number of managers. The noose, which was a six-inch piece of string with a slip knot at one end, was immediately removed and the area manager was called in to investigate the matter. Ultimately, the area manager determined that no discipline was warranted, but provided sensitivity training for the facility’s employees. The driver informed the area manager that he believed training alone was insufficient and harsher discipline was warranted, but the area manager declined. The following day, the driver stopped responding to calls from the dispatcher. The company viewed this as a serious issue because some of the supplies the driver delivered could be life sustaining. The employer then scheduled a meeting to discuss communication with the driver, but he failed to appear. A local manager approached the driver and informed him that he could either attend the meeting or leave. The driver left and was ultimately terminated. He filed a claim of retaliation, alleging that he was terminated because of his complaints regarding the noose, and denying that he stopped communicating with the dispatcher. In upholding summary judgment for the company, the U.S. Court of Appeals for the Sixth Circuit focused on the undisputed fact that the employee had refused to meet with the area manager regarding the communication dispute. Even if it were true that the employee had not failed to communicate with the dispatcher, that did not allow him to refuse to meet with his employer. Taking disciplinary action against employees who have engaged in protected activity is a delicate issue, but employers should remember that past protected activity does not insulate employees for discipline related to future misconduct.

Davis v. Omni-Care, Inc., No. 10-3806 (6th Cir. June 1, 2012)

Employer’s Failure to Properly Handle Harassment and Retaliation Claim Creates a Triable Issue of Fact

A receptionist at a medical office complained about receiving explicit text messages and unwelcome physical sexual advances from a doctor in the office. When advised that the matter would be investigated, she inquired about whether the doctor would remain in the office. She was told that he would. That made the receptionist uncomfortable about returning to

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work, and she was alternatively offered her final paycheck. The receptionist did not return to work, took her last paycheck and sued the employer for sexual harassment and retaliation under Title VII of the Civil Right Act of 1964, as amended, and under Alabama state law. The employer prevailed on its motion for summary judgment on the ground that it was not responsible for the doctor's actions because it took reasonable steps to prevent and correct harassment, and because there was insufficient evidence that a materially adverse action occurred. The U.S. Court of Appeals for the Eleventh Circuit reversed, reasoning that the employer was responsible for taking immediate and appropriate corrective action, including a reasonable investigation. Here, the court held that a jury could find that when the receptionist complained and was given the option to return to work status quo or get her last paycheck, this meant no meaningful action would be taken. Similarly, the court found that a reasonable jury could also find that the receptionist did experience a materially adverse action when she was given those options. This case highlights the importance of a swift and thorough investigation of all complaints of discrimination, harassment and retaliation. Employers should ensure that their human resources personnel and other handling managers are trained in how to respond to and investigate such complaints.

Kurtts v. Chiropractic Strategies Grp. Inc., No. 11-11546 (11th Cir. June 1, 2012)

Employer Failed to Reasonably Accommodate Employee With Seasonal Affective Disorder

A school district employee began to experience symptoms of seasonal affective disorder, a form of depression. In response to the symptoms, the employee requested a different classroom with exterior windows. Her request was denied. The employee's psychologist and primary care physician both recommended that she take a leave of absence due to the illness. After taking approximately two years of leave, the employee sued the school district, alleging that it had failed to make a reasonable accommodation for her disability. The employer successfully challenged her claims at the district court level, and the employee appealed. The U.S. Court of Appeals for the Seventh Circuit held that there was a triable issue of fact as to whether the employee was a qualified individual with a disability within the meaning of the American with Disabilities Act (ADA) and as to whether the school district was aware of the disability. Thereafter, the case proceeded to trial and the jury returned a verdict in favor of the employee. The school district challenged the sufficiency of the evidence, post-trial, but was unsuccessful, leading to a second appeal. The court of appeals found that there was sufficient evidence for a jury to find that the employee was a qualified individual with a disability under the ADA, and that the school district knew of the disability within the relevant time period. The court affirmed the lower court's ruling. Employers must undertake a good faith interactive process with employees to determine whether and/or how a reasonable accommodation can be provided for disabled employees. Refusing to accommodate, or denying accommodations without good cause, may lead to costly litigation.

Ekstrand v. School District of Somerset, No. 11-1949 (7th Cir. June 26, 2012)

D.C. Circuit Upholds Large Jury Verdict in Favor of Male Sexual Harassment Victim

A female lobbyist employed her former personal trainer, a male Serbian immigrant, at her lobbying firm and agreed to sponsor his H-1B visa so that he could stay in the United States. Over the course of his employment with the firm, the employee claimed that he was consistently subject to sexual harassment from the lobbyist, who was his supervisor. Although the employee rebuffed his supervisor's advances, he claimed that she forbade him from dating other women and reminded him that his immigration status was in her hands. After the employee was terminated, he filed a lawsuit for sexual harassment, hostile work environment and retaliation pursuant to the District of Columbia Human Rights Act. The jury awarded the employee more than $800,000 in damages, plus a significant attorneys' fees award. The employer appealed, arguing various instructional and evidentiary errors at the trial court level. The U.S. Court of Appeals for the D.C. Circuit found those errors to be "harmless," and affirmed the judgment and award. Sexual harassment laws apply equally to both genders. It is important to have clear anti-harassment policies in place, and to ensure that employees, particularly supervisors and decision-makers, are trained in acceptable workplace conduct.

Campbell-Craine Associates, Inc. v. Stamenkovic, No. 09-CV-64 (D.C. Cir. May 31, 2012)

Eighth Circuit Underscores Difference Between Title VII and the Equal Pay Act

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A female employee who was paid less than a male employee who performed the same kind of work sued the employer under the Equal Pay Act. The jury returned a verdict in favor of the employer. The U.S. Court of Appeals for the Eighth Circuit found an instruction given to the jury improper because it asked the jury to consider the employer's intent behind its decision to award unequal pay. The court explained that such an instruction is appropriate in gender discrimination cases that arise under Title VII of the Civil Rights Act of 1964, as amended, because under Title VII, an employer "is entitled to make its own subjective personnel decisions . . . for any reason that is not discriminatory." In contrast, the Equal Pay Act is "a strict liability statute, [that] does not require [employees] to prove that an employer acted with discriminatory intent; [employees] need show only that an employer pays males more than females." Accordingly, the jury instruction was not appropriate because the employer's intent behind paying the employee less than male counterparts was irrelevant. This case underscores a significant distinction between Title VII and the Equal Pay Act and serves as a good reminder to employers to ensure that male and female employees who perform substantially equal work under similar working conditions are compensated equally as well.

Bauer v. Curators of Univ. of Mo., Case No. 11-2758 (8th Cir. June 6, 2012)

Despite Reasonable Accommodation Policy, Employer Potentially Liable for Retaliation

An overnight stocker at a retail store had certain lifting restrictions during her pregnancy and requested an alternative position with no lifting. No such position existed, and pursuant to the employer's accommodation in employment policy, the employee was provided with a temporary leave of absence. The employee sued, claiming that the employer was retaliating against her for filing a prior charge with the Equal Employment Opportunity Commission. The employer successfully sought summary judgment and the employee appealed. The U.S. Court of Appeals for the Seventh Circuit first considered whether the employer's placement of the employee on temporary leave, pursuant to its policy, was a "materially adverse employment action" that could support a retaliation claim. The employer argued that it could not be, given that its supervisors were merely adhering to a legally permissible policy. The court of appeals disagreed, however, reasoning that employers cannot shield themselves from liability by hiding behind a broad company policy, and that excusing a materially adverse action because of compliance with a company policy would essentially allow a company to retaliate with impunity. Compliance with a written policy, even a properly drafted one, does not guarantee protection against all potential claims, especially retaliation claims under Title VII of the Civil Rights Act of 1964, as amended. Managers and supervisors should be instructed to consider all possible legal implications when making employment decisions.

Arizanovska v. Wal-Mart, No. 11-3387 (7th Cir. June 12, 2012)

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